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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

June 24, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554


Re: IB Docket No. 96-261

Dear Mr. Caton:

Transmitted herewith, on behalf of ABS-CBN Telecom, North America, Inc. (ABS-CBN) are an original and nine copies of "Supplemental Comments" in the above referenced proceeding to establish new U.S. dollar "benchmarks" for the settlement rates paid by U.S. International Message Telephone Service (IMTS) carriers. These "Supplemental Comments" are being filed in response to the FCC's June 4, 1997 invitation. See FCC Public Notice (DA 97-1173) "International Bureau Seeks Additional Comments In The Settlement Rate Benchmarks Proceeding (Notice of Proposed Rulemaking)", released June 4, 1997.

Any questions regarding this filing should be directed to the undersigned.

Sincerely yours,


Gregory C. Staple

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JUN 24 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
International Settlement Rates) IB Docket No. 96-261
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SUPPLEMENTAL COMMENTS OF ABS-CBN TELECOM, NORTH AMERICA, INC.

These Supplemental Comments are filed on behalf of ABS-CBN Telecom, North America, Inc. (ABS-CBN Telecom),¹ in response to the Commission's June 4, 1996 Public Notice.² The Notice asks interested parties to comment on the agency's new proposal, first announced in the Foreign Participation Notice,³ generally to prohibit a U.S. facilities-based private line carrier from routing U.S. switched traffic over its private line facilities to or from a foreign point until all U.S. carriers' settlement rates for the foreign point are within the settlement benchmarks to be established in this docket. Thus, the Foreign Participation Notice apparently proposes to apply such settlement benchmarks to a wider range of international carrier services than was

¹ ABS-CBN Telecom is a California-based U.S. international carrier. An affiliated carrier, International Communications Corporation (ICC), provides local exchange, long distance and international services in the Philippines. NYNEX Corporation holds an indirect 25% interest in ICC.

² Public Notice, DA 97-1173, "International Bureau Seeks Additional Comments In The Settlement Rate Benchmark Proceeding, (Notice of Proposed Rulemaking) IB Docket No. 96-261," released June 4, 1997.

³ Order and Notice of Proposed Rulemaking, IB Docket No. 97-142, FCC 97-195, released June 4, 1997 (Foreign Participation Notice), ¶¶ 50, 121.

contemplated in the FCC's original Benchmark NPRM⁴ -- hence, the invitation for further comments.

A. The Settlement Benchmarks Which The FCC Would Use To Limit The Interconnection Options Of U.S. Facilities-Based International Private Line Carriers And Other Parties are Unlawfully Derived From Confidential Non-Record Data

As ABS-CBN Telecom has previously shown, there is no record basis in this docket for establishing a settlement benchmark for the Philippines or for most other countries because, inter alia, the proposed benchmarks are impermissibly derived from non-record data supplied to the International Bureau in confidence by AT&T Corp. (AT&T).⁵ ABS-CBN Telecom also has been

⁴ Notice of Proposed Rulemaking, IB Docket No. 96-261, FCC 96-484, released December 19, 1996 (Benchmark NPRM).

⁵ See ABS-CBN Telecom "Comments," filed February 7, 1997, at 5-8, and the company's "Reply Comments," filed March 31, 1997, at 6-8.

The Benchmark NPRM proposes to calculate country-specific and income-banded settlement benchmarks (reflecting a country's GNP per capita) by adding the prices for the major foreign network components used to terminate U.S. originated international traffic: (a) the tariffed price for the international transmission segment; (b) an estimated price for the international gateway switching component; and (c) the tariffed price for the national extension or domestic termination facilities. The total is collectively referred to as the "tariffed components price" or TCP. See Benchmark NPRM ¶¶ 35-36.

The AT&T data at issue involves the geographic distribution of U.S.-originated calls -- a crucial input for estimating the TCP for the national extension. According to the FCC's International Bureau: "The first step" in calculating the TCP for the national extension "is to determine the distribution of international calls from the United States within each country" so that they can be "distributed among [tariff] service classifications, time periods and destinations ..." Foreign Tariffed Component Prices, International Bureau, Telecommunications Division, FCC (December 1996) at 13 (TCP Report). "The result," the Bureau continues, "is a [TCP] figure that is weighted by each country's distribution of minutes from the United States among service and tariff rate categories ... and the distribution of calls throughout the country." Id.

(continued...)

advised by the FCC's staff that this crucial AT&T data is not even in the FCC's possession currently.

The Commission's recent decision in the Universal Service reform docket⁶ provides additional precedent for ABS-CBN Telecom's position that it would be unlawful for the FCC to prescribe a settlement benchmark for the Philippines and most other countries based upon the current record. After deciding that the level of universal service support for non-rural local exchange carriers (LECs) should be based upon the forward looking cost of providing the services eligible for support, the agency nevertheless declined to adopt any of the economic models advanced to calculate these costs because none of the models could be verified from on the record

⁵(...continued)

However, the TCP Report, upon which the Benchmark NPRM is based, does not provide any call distribution data by country. Nor is any data provided on the distance from the foreign gateway switch to the termination point for any call -- necessary information for grouping the calls into domestic tariff categories. As to the call data, the TCP Report simply states that the "distribution of minutes for each country was determined from information collected on customers' calls during a three month period that began on January 6, 1996" with a sample taken "for the same one-hour period of the week." Id. at 13.

Counsel has been advised by the Bureau's staff that this call data was in fact made available to the Bureau, in confidence, by AT&T but that the Bureau apparently was not permitted to retain a physical copy of said data. Hence, it is not possible for ABS-CBN Telecom or other interested parties to determine whether the Bureau's TCP calculations are accurate. Nor are interested parties able to judge whether the call distribution data used by the Bureau tends to understate actual termination costs for competing carriers, especially those with different call termination patterns, such as ICC in the Philippines, which do not receive the bulk of AT&T's U.S. originated traffic.

⁶ Report and Order, CC Docket No. 96-45, released May 19, 1997 (Universal Service Reform Order).

(i.e., publicly available) data.⁷

For example, the FCC noted that the so-called Benchmark Cost Proxy Model (BCPM) based its calculations of LEC expenses on a survey of eight incumbent LECs but “[n]either the survey instrument nor the individual carrier responses to the survey have been filed with the Commission.”⁸ Likewise, the FCC observed that the so called Hatfield 3.1 model, which was developed on behalf of AT&T,⁹ “is based on information that has not been fully made available to the Commission and all interested parties.”¹⁰

In view of the marked deficiencies in the AT&T-supported and other cost models, the FCC concluded that no adequate record currently existed for determining LECs' forward looking universal service costs. Accordingly, the agency decided to issue a further rulemaking notice to establish the terms and conditions for a forward-looking cost methodology for non-rural carriers. In so doing, the Commission also noted that, whether a state cost study or FCC methodology was ultimately used to determine LEC costs, certain criteria would need to be satisfied to ensure

⁷ See *id.* ¶¶ 242-44.

⁸ *Id.* ¶ 242.

⁹ “Hatfield Model, Version 2.2, Release 2,” Hatfield Associates, Inc., September 4, 1996, at 1 (“The Hatfield Model has been developed by Hatfield Associates, Inc. (HAI) of Boulder, Colorado, at the request of AT&T and MCI.”) This version of the model was transmitted by a September 10, 1996 Ex Parte Letter in CC Docket No. 96-45 to William F. Caton, Acting Secretary, FCC, from Richard N. Clauske, AT&T. See also AT&T's World Wide Web site at <http://www.att.com/publicpolicy/handbook/chap4.html> (stating that “MCI and AT&T are co-sponsors of the Hatfield Model.”)

¹⁰ Universal Service Reform Order ¶ 242. “For example,” continued the FCC, “the Hatfield 3.1 model adjusts the number of supported lines assigned to a CBG [Census Block] on the basis of an undisclosed algorithm. This algorithm has not been filed with the Commission.” *Id.*

consistency in calculating the level of universal service support. Among other things “[t]he cost study or [FCC] model and all underlying data, formulae, computations, and software associated with the model must be available to all interested parties for review and comment. [A]ll underlying data should be verifiable”¹¹

It is well established under the Administrative Procedure Act¹² that an agency may not base its decision in a rulemaking proceeding on confidential data that has not been subject to public comment.¹³ Therefore, the FCC cannot reject AT&T's attempt to persuade the agency to adopt its own model for costing LEC services in the U.S. (i.e., local termination costs) because the model contains confidential data which has not been provided to interested parties, and at the same time accept AT&T's similarly confidential data for estimating the domestic termination costs of foreign carriers. The FCC's conclusion in the Universal Service docket is the correct one both legally and as a matter of fundamental procedural fairness: the FCC may not adopt cost benchmarks which could adversely affect an interested party based on non-record confidential data supplied by another interested party.¹⁴

¹¹ Id. ¶ 250(8).

¹² 5 U.S.C. ¶ 551 et seq.

¹³ See National Black Media Coalition v. FCC, 791 F.2d 1016, 1023-24 (2d Cir. 1986); Home Box Office Inc. v. FCC, 567 F.2d 9, (D.C. Cir. 1977) (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415, 419-20 (1971)); United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252 (2d Cir. 1977); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir. 1973), cert. denied, 477 U.S. 921 (1974).

¹⁴ See also ABS-CBN Telecom Comments at 5-8.

B. Using The Proposed Settlement Benchmarks To Restrict The Interconnection Options Of U.S. Facilities-Based International Private Line Carriers Is Inconsistent With The Agency's Simultaneously Announced Proposal To Modify The International Settlements Policy (ISP)

The FCC's proposal to restrict the interconnection option of U.S. facilities-based international private line carriers in countries where U.S. carriers' settlement rates are higher than the proposed settlement benchmarks is also inconsistent with the agency's decision elsewhere in the Foreign Participation Notice to liberalize further the terms on which U.S. international carriers may obtain an ISP waiver.

Under the current rules, a carrier seeking to implement a non-standard settlement arrangement must show that the foreign country to be served satisfies the Effective Competitive Opportunities (ECO) test or that the arrangement is otherwise in the public interest.¹⁵ But under the new rule proposed in the Foreign Participation Notice, an alternative settlement arrangement with a carrier operating in a WTO member state would be presumed to be in the public interest.¹⁶ The settlement rates of other U.S. carriers on the route -- whether at benchmark levels or not -- apparently are not relevant, and, according to the Commission, "the burden would be on the opposing carrier to show that market conditions in the country in question are not sufficient to prevent a carrier with market power from discriminating against U.S. carriers."¹⁷

It follows, therefore, that where the foreign carrier has no market power (i.e., is non-

¹⁵ 47 C.F.R. § 64.1002(b); see also Fourth Report and Order, CC Docket No. 90-337, Phase II, FCC 96-459 (released December 3, 1996), ¶ 36 (reconsideration pending).

¹⁶ Foreign Participation Notice ¶ 152.

¹⁷ Id.

dominant) the public interest presumption is essentially un rebuttable. In such cases, under the new ISP flexibility policy, alternative interconnection arrangements by a U.S. carrier -- whether using its own private lines or otherwise -- will be permitted. If this is the result the FCC intends by the modified ISP flexibility policy advanced in the Foreign Participation Notice, then the application of the settlement benchmarks to interconnection arrangements involving facilities-based (or resold) private lines makes little sense. The benchmark requirement could simply be avoided by a carrier proposing an alternative settlement regime.

On the other hand, if this is not the result the FCC intends -- that is, the presumption in favor of granting an alternative settlement arrangement may be overcome by a showing that one or more carriers in that county have not met the benchmark settlement rates -- then the new policy is less liberal than the old one, and hence should be rejected as counterproductive. In either case, no public interest reason has been advanced by the FCC for restricting the right of non-dominant U.S. carriers to interconnect their private line facilities with the facilities of non-dominant foreign carriers on such terms as they may negotiate commercially.

C. Conclusion

In the absence of an adequate record in this docket, the FCC should adopt an interim accounting rate reform policy which has record support and, as in the universal service proceeding, issue a further notice to obtain such additional information as may be needed to support settlement benchmarks. Alternatively, the FCC should reconsider the need for country-by-country settlement benchmarks as compared to the adoption of other competitive safeguards (e.g., reporting rules) or structural measures (e.g., the ISP flexibility policy) to reduce the ability

of carriers to maintain above-cost settlements on those routes where U.S. carriers now have a large settlement deficit.

At the very least, the Commission should refrain from adopting benchmarks for non-dominant U.S. international carriers, including U.S. facilities-based international private line carriers, that correspond with non-dominant foreign carriers. Settlement rates for such carriers are most likely to approach cost if such carriers have the flexibility to negotiate interconnection terms as they see fit, notwithstanding the settlement rates of other U.S. carriers serving the route.

For all of the above reasons, the FCC also should defer adoption of a benchmark rate for the Philippines, at least until it can conduct a country-specific review of all the relevant factors so as to establish an adequate record.

Respectfully submitted,

ABS-CBN TELECOM,
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By



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June 24, 1997

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I, Barbara Frank, a secretary in the law firm of Koteen & Naftalin, L.L.P. do hereby certify that copies of the foregoing "SUPPLEMENTAL COMMENTS" were mailed first-class U.S. Mail, postage prepaid, this 24th day of June 1997 to the following:

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